

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:

CHERYL CIBULA PAYNE,	:	Case No: 20-30524
Debtor.	:	Chapter 13
THOMAS C. PAYNE,	:	
Plaintiff,	:	
v.	:	AP No: 20-03037
CHERYL CIBULA PAYNE,	:	
Defendant.	:	

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

COMES NOW the Defendant Cheryl Cibula Payne, by counsel, and moves this court, pursuant to F.R.B.P. 7012(b)(6), to dismiss the “Motion Pursuant to 11 U.S.C. §1328” for failure to state a claim upon which relief can be granted. As her grounds in support thereof, Defendant states as follows:

1. A Domestic Support Obligation is defined in 11 U.S.C. §101(14A) and consists of the four elements found in subsections (A), (B), (C), and (D).
2. A party attempting to prove the existence of a Domestic Support Obligation must prove all four elements. *In re Forgette*, 379 B.R. 623 (Bankr. W.D. Va, 2007).
3. Although Plaintiff alleges the debt is a Domestic Support Obligation, he has failed to allege specifically elements (B) and (D).
4. Plaintiff bears the burden of proving a Domestic Support Obligation is support or “actually in the nature of alimony, maintenance or support.” *Pagels v.*

Pagels, APN 10-07070-SCS (EDVA Bkr. 2010) citing *Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986).

5. In support of his “Motion” in this chapter 13 case, Plaintiff erroneously relies on *In re Schenkein*, 2010 WL3219464, a New York chapter 7 case, which stands for the proposition that it does not matter in chapter 7 whether the debt is a 523(a)(5) debt or a 523(a)(15) debt.

WHEREFORE, the Defendant moves this court to dismiss the “Motion Pursuant to 11 U.S.C. §1328”, and to issue such other orders, processes, or judgments that are necessary or appropriate to carry out the provisions of Title 11.

Date: May 20, 2020

CHERYL CIBULA PAYNE
By Counsel

/s/James H. Wilson, Jr.
James H. Wilson, Jr.
Counsel for Defendant
VSB No: 27878
4860 Cox Road, Suite 200
Glen Allen, VA 23060
(804) 740-6464

PROOF OF SERVICE

I certify that I have this 20th day of May, 2020, mailed a true copy of this Motion to James M. Goff, II, Esq., James M. Goff, II, P.C., 10310 Memory Ln., Ste. 2C, P.O. Box 313, Chesterfield, VA 23832.

/s/ James H. Wilson, Jr.
James H. Wilson, Jr., VSB No: 27878
Counsel for Defendant